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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN C. HEUBECK, Petitioner and Appellant, v. MILAGROS A. FARAON HEUBECK, Defendant and Respondent.	B186033 (Los Angeles County Super. Ct. No. BD366012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Reversed in part, affirmed in part, and remanded.

John C. Heubeck, in pro per.

Jeanine G. Strong and Bert H. Cohen, for Defendant and Respondent.

Petitioner and appellant John Heubeck (husband) appeals from the July 15, 2005, order modifying a prior order regarding child support and attorney's fees to be paid to respondent Milagros Heubeck (wife). Husband contends the trial court: (1) lacked jurisdiction to reconsider the prior order because it did not comply with Code of Civil Procedure section 1008, subdivision (a); (2) erred in making the order retroactive; (3) failed to consider the parties' current income and ability to pay; (4) incorrectly calculated husband's net disposable income; (5) did not consider husband's circumstances and station in life when calculating child support; (6) erred in awarding an advancement of attorney's fees; and (7) refused to issue a written statement of decision. Except for ordering child support retroactive to a certain date, we affirm the trial court's rulings.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Husband and wife were married on September 26, 1994. In 1995, they bought a home together and on February 25, 1998, had their only child, a daughter.

Both lawyers, husband was a 40 percent equity partner in Davis & Heubeck, a law firm specializing in plaintiffs' asbestos litigation while wife initially stayed at home with their daughter. In July 2000, husband moved out of the marital home. In October 2000, wife obtained employment as a salaried attorney. Husband filed a petition for dissolution in March 2002 and a Final Judgment of Dissolution was entered on July 15, 2004.

Meanwhile, on November 26, 2003, the parties filed a "Stipulation Re [Husband's] Order to Show Cause, Pendente Lite Child Custody and Timeshare, and Order Thereon." Therein, they stipulated to joint legal and physical custody of their daughter, and specified the weekly drop-off and pick-up times, holiday arrangements, etc.

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[1] Pursuant to former California Rules of Court, rule 27(a) (see current rule 8.276(e)(1)(A)), wife filed a motion for sanctions for a frivolous appeal. Inasmuch as we find merit to one of husband's contentions, the appeal was obviously not frivolous and we deny the motion.

There was no agreement as to support. In an Order to Show Cause filed on May 28, 2004, wife sought guideline child support, spousal support and attorney's fees.

In a declaration filed in opposition to the OSC, CPA Bruce Siegel averred that husband's estimated taxable income "is not indicative of the amount of his cash flow or income available for his personal use." Siegel explained that operation of husband's law partnership required substantial amounts of cash to be maintained in an operating account to pay both the reoccurring expenses of the business and to advance the costs of litigation. According to paragraph 13 of the declaration: "In the year 2003, [husband's] gross taxable income was approximately $1,195,700. After expenditures to cover the client costs and the retention of operating cash, he received distributions of $420,271. Of this amount, $150,000 was paid to the IRS and Franchise Tax Board for the previous year's tax liability. The remaining balance of $270,271 was available for his personal use. This would be his 2003 cash flow before personal expenses."

In June 2004, wife subpoenaed financial records from husband's law firm, including its most recent tax return. Husband produced the partnership ledgers for 2002 through June 30, 2004, but no profit-loss statements or any documents allocating income and expenses for 2003 and 2004. Partnership records were subpoenaed for the hearing on wife's OSC, but nothing was produced that day.

Wife's OSC was heard on September 2, 2004, the Honorable Luis A. Lavin, presiding. Husband maintained that his 2003 net monthly income was $17,117, based upon an annual net income of $205,404.[2] Wife maintained husband's net monthly income for the same period was $82,000, based on Siegel's declaration that husband's net income was $984,000 (gross income of $1,195,000 less $211,000, which was husband's portion of the law firm's expenses during that period). Wife also maintained husband

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[2] According to husband's Income and Expense Declaration, dated June 4, 2004, he is a partner in the Davis & Heubeck, LLP; his average monthly salary, calculated from partnership distributions over the previous 18 months, was $17,117; his total monthly expenses were $17,037.22; and he had custody of the couple's daughter 66.66 percent of the time.

was entitled to a distribution from the law firm of an additional $360,000, reflecting his portion of a case settlement completed that year (the Harker settlement).

A written order was filed several months after the hearing.[3] In it, the trial court made the following findings and orders:

- The couple's child spends 39 percent of her time with wife and 61 percent of her time with husband
- According to the accountant's declaration, husband's taxable gross income in 2003 was approximately $1,195,700 and after expenditures to cover client costs and a retention of operating cash, he received a distribution of $422,071
- Husband testified he needs to retain $500,000 to cover predictable operating expenses for the partnership
- Husband's share of the Harker settlement fee is $350,000 which he will place in an annuity to generate $50,000 income per year for seven years
- No additional distributions from the partnership could be made to its partners in that remaining income was needed to cover expenses. If the partnership could make additional income distributions to the partners but for some reason chose not to do so, that would be income available for support
- The purchase of the annuity will be finalized in the week or two after the September 2, 2004
- Husband's annual income available for support is: $420,271 from the partnership; and $50,000 from the annuity

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[3] The written order which we refer to as "the Prior Order," was not filed until July 12, 2005. This was because, at the conclusion of the hearing, the trial court directed husband to prepare a written order, but husband failed to do so. Later, when wife sought reconsideration of the Prior Order and the trial court expressed concern that, because no written order was ever filed, he had nothing to reconsider, the trial court directed wife to prepare a written order.

- Based on paragraph 13 of the accountant's declaration, husband's monthly income is: $35,022 from self-employment; and $4,166 of other taxable income from the annuity
- Observing that it may not have all information about the parties' respective income and assets, the court reserved the issue of an award of attorney's fees to wife to the time of trial
- Based on these findings, the trial court ordered: "As and for child support, [wife] shall pay [husband] the sum of $106 per month . . . ."

On or about December 15, 2004, wife received, for the first time, husband's 2003 partnership and personal tax returns. The partnership return reflected ordinary income of $2,940,806, comprised of gross receipts of $3,587,183 less deductions totaling $646,377. Of those amounts, husband's K-1 indicated that, as a 40 percent partner in the firm, he received $1,195,701 in ordinary income, plus a $420,271 distribution of property. Husband's personal return indicated he received partnership income of $1,195,701. That same day, husband informed wife that he had not purchased the annuity discussed at the September 2, 2004 hearing.

On January 28, 2005, wife filed a notice of motion for attorney's fees and costs and for what she characterized as "reconsideration [Code of Civil Procedure section] 1008 [subdivisions] (a) & (b)." She argued that the Prior Order was based on husband's representation that his gross salary was $35,000 per month, but husband's 2003 tax returns constituted new information which showed that husband's income was understated by $500,000. According to the accompanying Income and Expense Declaration, dated January 25, 2005, wife's gross monthly income for 2004 was $7,064, her average monthly expenses were $7,209, and she had the child 50 percent of the time.

Husband opposed the motion, arguing, in pertinent part, that the Prior Order was based on the historical marital standard of living and not on husband's income and it was therefore irrelevant whether husband's income was more than estimated at the September 2, 2004 hearing. Moreover, husband argued that changed circumstances warranted the elimination of spousal support altogether. Specifically, husband

maintained that his income for 2004 had been just $110,000 – 90 percent less than what it had been in 2003.[4]

When the motion came on for hearing before Judge Lavin on June 7, 2005, he indicated he was inclined to grant reconsideration as to child support and attorney's fees, but not as to spousal support "because the court's order on the issue of spousal support was based on the marital standard of living and wasn't based on the parties' income." However, he continued the matter to give the parties an opportunity to brief whether the court had jurisdiction to reconsider under section 1008, where no written order had ever been entered but the motion was made more than 10 days after entry of the minute order, and new information had been discovered.

For the continued hearing, husband filed a declaration in which he averred that his 2003 tax returns did not constitute new information because they were not inconsistent with his testimony at the September 2, 2004 hearing. First, husband argued, the Prior Order correctly took into account that he did not receive $1,195,000 from the law firm in 2003 because a substantial portion of that money was added to his capital account at the law firm: "The capital account reflects [husband's] share of the depreciating assets, the substantial amounts advanced as part of client costs and retention of capital for future expenses and future client costs." Second, regarding the annuity, husband argued that, although he had every intention of using the Harker settlement to open an annuity at the time he made this representation to the trial court on September 2, 2004, other financial events occurred in his life that made doing so impractical.

At the continued hearing on July 12, 2005, the trial court signed the written order, submitted by wife, memorializing the rulings he made on September 2, 2004. After hearing oral argument on the motion for reconsideration, he took the matter under submission. On July 15, 2005, the trial court filed a "Decision On Motion For

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[4] In an Income and Expense Declaration dated June 4, 2005, husband estimated his gross monthly income for 2004 was $15,000, his monthly expenses were $15,000, and he had custody of the child 60 percent of the time.

Reconsideration," which modified the Prior Order (Order Modifying Child Support). Attached to the written decision was a DissoMaster printout. According to the written decision: "1. [Husband] is ordered to pay [wife] guideline child support in the amount of $3,599 per month. . . . The Court's findings are set forth in the attached DissoMaster printout. This order is effective as of June 1, 2004 and shall continue until further order of the Court. The parties shall meet and confer to establish a payment plan for arrearage. [¶] 2. After taking into account *all* of the factors relevant to request for an award of attorney's fees and costs pursuant to Family Code [s]ections 2030 and 2032, the Court concludes that an award of attorney's fees and costs to [wife] is appropriate at this time. [Husband] shall pay to [wife] the sum of $6,000, as and for a contribution to her attorney's fees . . . . [¶] With regard to spousal support, the Court based its decision on the marital standard of living, not on the parties' income. Accordingly, the spousal support order is not modified."

Husband filed a "Request For A Statement of Decision Or, In The Alternative, [Husband's] Objections to the 'Decision On Motion For Reconsideration' Filed On July 15, 2005." Therein, husband requested a formal statement of decision " 'explaining the factual and legal basis for its decision' pursuant to [Code of Civil Procedure section] 632, Family Code [section] 3654 and [California Rules of Court, rule] 232." Alternatively, husband argued, if the Statement of Decision filed July 15, 2005, was intended to constitute a formal Statement of Decision, he objected to it on the grounds that it failed to state the legal and factual basis for the decision.

Wife objected that husband's request was untimely (Code Civ. Proc., § 632) and opposed husband's objections to the Statement of Decision on the grounds that husband was simply rearguing the motion for reconsideration.

The trial court denied husband's request.

On September 12, 2005, husband filed a notice of appeal from the Order Modifying Child Support.

DISCUSSION

1. *The July 15, 2005 Order Modifying Child Support Is Enforceable*

As we understand husband's contention it is that the Order Modifying Child Support is unenforceable because, under *In re Marriage of Olson* (1980) 27 Cal.3d 414, 421-422 (*Olson*), it was only a tentative decision. We disagree.

Olson concerned "the duties of a trial court in a dissolution proceeding when property is lost to the community during the period between the announcement of an intended decision and the entry of an interlocutory decree." (*Id*. at p. 416.) In that case, there was a trial on the limited issue of the division of community property, including the family residence. The trial court issued a "Decision on Submitted Matter" on May 23, 1978, in which it found the family residence had net equity and awarded it to the wife. (*Id*. at p. 418.) A few weeks later, the wife moved to reopen because, in the interim, the family residence had been in a foreclosure sale which resulted in no net proceeds to the wife or husband. The trial court denied the motion and, the next day, filed an interlocutory judgment that was in accord with its Statement of Decision. (*Id*. at p. 420.) The appellate court reversed, reasoning that the trial court had failed to divide the community property equally because in fact there was no equity in the family residence. The Decision on Submitted Matter was not a judgment that restricted the trial court's reconsideration of its proposed division of community property prior to entry of judgment, but was merely an announcement of the trial court's intended judgment.

Here, the Order Modifying Child Support was not, like the order in *Olson*, a statement of what the trial court intended to do in a final judgment. Rather, the Order Modifying Child Support was a final order on the issue of temporary child support. Accordingly, *Olson* is inapposite and the Order Modifying Child Support is an enforceable order.

2. *Procedure for Seeking "Review" of the Prior Order*

Husband contends wife failed to follow proper procedures for seeking review of the Prior Order. He argues that wife's alternatives were limited to: (1) submitting her own proposed order when she realized husband had failed to submit one, and then moving for reconsideration of that order within 10 days in accordance with Code of Civil Procedure section 1008(a); (2) filing a motion pursuant to Code of Civil Procedure section 473;[5] (3) filing a motion pursuant to Family Code section 2120 et seq.; (4) appealing the Prior Order pursuant to Family Code section 3554 and Code of Civil Procedure section 904.1, subdivision (a)(10); (5) filing a motion under Family Code section 3651, subdivision (a).

Here, at least in this section of his Opening Brief, husband does not support his contentions with a cognizable legal argument. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry* v. *Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; see also *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278 [same].) Accordingly, except to the extent these contentions are argued elsewhere in the brief, we deem them abandoned.

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[5] In support of this proposition, husband cites *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947. In that case, the teenage children of the defendant sued their father for past child support and for misappropriation of their trust assets as a result of the dissolution agreement father and mother entered into a decade earlier which provided that father's support obligations were limited to the difference between what the children received from their grandfather's testamentary trust and $125 per month. The appellate court concluded that the sons could not collaterally attack the judgment which established the support obligation. They had not alleged their father committed fraud in the divorce action, which might independently justify collateral attack under Code of Civil Procedure section 473. (*Id*. at p. 952.) We do not see, and husband does not explain, how this case is pertinent to the issues here.

3. *Compliance with Section 1008 Unnecessary*

Husband contends the trial court lacked jurisdiction to consider wife's motion for reconsideration because the motion did not comply with the procedural requirements of Code of Civil Procedure section 1008. He is incorrect.

Code of Civil Procedure section 1008 prescribes the circumstances under which a motion for reconsideration can generally be filed, and the procedure for doing so. In *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1499, the court held that California Code of Civil Procedure section 1008 " 'is the exclusive means for modifying, amending or revoking an order. That limitation is expressly jurisdictional.' [Citation.]" But, as we explained in *In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360 (*Hobdy*), Code of Civil Procedure section 1008 does not govern certain motions brought in family law cases.

In *Hobdy*, the issue was whether the trial court in a dissolution proceeding had jurisdiction to hear a renewed motion for attorney's fees, brought after a prior motion was denied, where the renewed motion did not satisfy the procedural requirements of Code of Civil Procedure section 1008(a). We noted that "Family Code sections 210 and 211, and [former] California Rules of Court, rules 5.21 and 5.22, acknowledge the relationship between family law procedure and rules, on the one hand, and statutes applicable to civil actions generally, on the other. (See also *In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1040, (*Armato*) []; *Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 486 []; Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2004) ¶ 5:526 [].)" (*Id*. at p. 365, fn. 8.) However, we concluded, "application of statutory construction rules that favor specific legislation over the more general, disfavor implied repeal, harmonize statutes on similar subjects, and make paramount legislative intent" compelled the conclusion that Code of Civil Procedure section 1008 did not

govern renewed motions for attorney's fees in family law cases. (*Id*. at p. 367.) Rather, such motions were governed by Family Code section 2030 (§ 2030).[6] (*Ibid*.)

Our reasoning in *Hobdy* applies equally to motions for modification of a child support order. Family Code section 3651 (§ 3651) provides that, with certain exceptions not relevant here, "a support order may be modified or terminated at any time as the court determines to be necessary." Thus, like section 2030 attorney's fee awards, section 3651 modification of support orders is fundamentally at odds with Code of Civil Procedure section 1008 in that there is no 10 day limitation in section 3651. Additionally, unlike Code of Civil Procedure section 1008, subdivisions (a) and (b), both of which require a showing of new or different facts, circumstances, or law, section 3651 has no such express requirement.[7]

Here, under the reasoning of *Hobdy*, Code of Civil Procedure section 1008 did not govern wife's renewed motion for attorney's fees and to modify the prior support order. Rather, that motion was governed by section 3651. That wife characterized her motion as

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[6] In pertinent part, section 2030 provides that, to ensure each party to a dissolution proceeding has access to legal representation to preserve that party's rights, the court may order one party to pay the other party's attorney. (§ 2030(a)(1).) According to subdivision (a)(2) of the statute: "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay." "The court shall augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded." (§ 2030(c).)

[7] Wife argues: "The reasoning of *Hobdy* does not apply here, because section 3651 is not a more specific statute governing child support that should be construed to repeal [Code of Civil Procedure] section 1008." She both appears to misunderstand the import of *Hobdy* and is incorrect that section 3651 is not a more specific statute than Code of Civil Procedure section 1008. In *Hobdy*, we harmonized Code of Civil Procedure section 1008 with section 2030 by finding that motions for attorney's fees in family law matters were governed by the more specific section 2030, we did not find that section 2030 repealed Code of Civil Procedure section 1008. We come to the same conclusion here regarding section 3651 and motions to modify child support orders.

one for reconsideration pursuant to Code of Civil Procedure section 1008(a) and (b) is irrelevant. The true nature of a pleading will be determined from its allegations, regardless of its designation by the pleader. (*Holtzendorff v. Housing Authority of City of Los Angeles* (1967) 250 Cal.App.2d 596, 636.)[8]

4. *The Trial Court Did Not Err In Its Treatment of Husband's Evidence of Current Income*

Husband contends that, pursuant to section 3651, the trial court failed to consider his current income and ability to pay in determining the motion to modify the Prior Order. He argues that, during the hearing on the motion, "[husband] reported, and [husband's] accountant confirmed the fact in his declaration, that [husband's] 2004 taxable income was under $100,000 – a 90 [percent] decrease from prior years . . . ," but the trial court refused to consider this evidence.

"[W]hether the modification is warranted depends on the facts and circumstances of each case; an appellate court will not interfere with the trial court's action unless, as a matter of law, an abuse of discretion is shown; and any conflicts in the evidence or in reasonable inferences to be drawn from the facts will be resolved in support of the decision of the trial court. [Citation.]" (*Miller v. Miller* (1970) 11 Cal.App.3d 197, 199; see also *In re Marriage of Thompson* (1979) 96 Cal.App.3d 621, 624; *Kornblatt v. Kornblatt* (1970) 9 Cal.App.3d 619, 625.) The power to make an order modifying child support is " 'limited to the conditions and circumstances existing at the time they are made. The court cannot then anticipate what may possibly thereafter happen, and provide for the future contingencies.' [Citation.]" (*Miller v. Miller, supra,* at p. 201.)

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[8] Husband agrees that wife should have filed a motion to modify child support under section 3651, subdivision (a) and speculates that her reasons for not doing so were to avoid the retroactivity bar. While husband argues that wife failed to make the requisite showing of new or different facts, circumstances or law under section 1008, he makes no such argument with respect to the changed circumstances element of section 3651, subdivision (a).

Here, the evidence before the court at the hearing included husband's 2003 tax returns. Although husband maintained that his 2004 income would be far less than his prior year's income, his 2004 tax returns were not introduced into evidence and the trial court was not required to accept husband's or his accountant's representation of what those returns would show. After all, there was a disparity in actual and projected income in 2003, and in September 2004, husband told the court that he would establish an annuity paying $50,000 a year with the $360,000 settlement he was entitled to receive that year, but husband failed to do so. Under these circumstances, we find the trial court did not fail to consider husband's existing conditions and circumstances; it simply disbelieved husband's representation of their nature.[9]

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[9] At the hearing on the motion to modify the Prior Order, the following colloquy occurred: "[HUSBAND]: Now, if we're dealing with 2004, again, the tax return for 2004 won't be prepared for a couple of months. However, I submitted a declaration by the accountant. Despite [wife's counsel's] optimistic view of my income for 2004, the declaration of the accountant said *it is going to be* less than $100,000. That is a 90 percent decrease. [¶] THE COURT: "Well, your income for 2004 or your income on a prospective basis is irrelevant for this proceeding. This is a request for reconsideration of an order made in September, retroactive to June of '04. And on a going-forward basis, obviously, if there is a change of circumstances or your income changes, you're certainly welcome to go back . . . and get the order modified." (Italics added.) The trial court's choice of words seems to be a function of wife's characterization of the motion as one for "reconsideration" of the earlier order. However, diction is not as significant as decision. "[A] trial court's reliance on erroneous reasoning is no basis for reversal if the decision is correct. [Citation.] We review the correctness of the challenged ruling, not of the analysis used to reach it." (*In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045.)

In any event, as of the July 12, 2005 hearing, husband had not filed his 2004 income tax returns. Considering the earlier disparity between his projected and actual income, and husband's failure to purchase the annuity, the trial court was justified in not relying on husband's or his accountant's statements on husband's likely 2004 income totals. Instead, the court invited husband to seek further modification as the 2004-2005 financial picture became clearer.

5. *Calculation of Husband's Net Disposable Income*

Husband contends the trial court miscalculated his net monthly income for purposes of determining the proper amount of guideline child support. He argues that the $99,675 and $29,166 amounts are "without any explanation as to what the Court used to arrive at those figures or how the average was calculated." He also complains that the trial court failed to deduct amounts for law firm operating costs and advancement of client litigation expenses. We disagree.

According to the DissoMaster printout attached to the trial court's written statement of decision, the trial court used the following figures to arrive at its child support award: husband's gross monthly self-employment income was $99,675 (x 12 months equals $1,196,100 annual) and his gross other taxable monthly income was $29,166 (x 12 months equals $349,992 annual). These figures are consistent with husband's 2003 personal tax return which indicated that his total income in 2003 was $1,196,100, and husband's own admission that he never opened the promised annuity with the $350,000 settlement he received.

As for deductions for law firm operating expenses and future litigation costs advances that husband argued should be deducted from his self-employment income, the law firm's 2003 tax return shows that the law firm's gross receipts or sales in 2003 were $3,587,183; but, after deducting salaries, rent, etc. in the amount of $646,377, the firm's ordinary income was $2,940,806 and it was this amount that was distributed to the partners. Thus, it was evident that husband's partnership income already was reduced by the amounts he sought to deduct in arriving at his available income for child support.

6. *Husband's Circumstances and Station in Life*

Husband contends the trial court's reliance on the DissoMaster to calculate child support was misplaced because this case falls under the exception for a parent with extraordinarily high income.

According to Family Code section 4057, the amount of child support established by the formula provided in subdivision (a) of section 4055 is presumed to be the correct amount of child support to be ordered, but may be rebutted by evidence that "application of the formula would be unjust or inappropriate in the particular case . . . because one or more of the following factors is found to be applicable by a preponderance of the evidence . . . ." One of the factors listed is that "[t]he parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children." (§ 4057, subd.(b)(3).)

In *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183, the court held: "The supporting parent who seeks to rebut the statutory formula and gain protection from disclosure of detailed financial information as an 'extraordinarily high earner' must show: (1) he or she has an extraordinarily high income, and (2) the guideline support amount exceeds the child's needs. When the extraordinarily high earning supporting parent seeks a downward departure from a presumptively correct guideline amount, it is that parent's 'burden to establish application of the formula would be unjust or inappropriate,' and the lower award would be consistent with the child's best interests. ([Citation]; §§ 4053, subd. (k), 4057, subd. (b)(3), and 4056, subd. (a)(3).)"

Here, husband did not admit that he was an extraordinarily high earner. On the contrary, he denied that his income was as high as his tax returns showed it to be. Moreover, he presented no evidence that the guideline amount would be unjust or inappropriate, or that a lower award would be consistent with his daughter's best interests.

7. *The Modified Child Support Order Could Not Be Made Retroactive Beyond the Date of the Motion to Modify Was Filed*

Husband contends the trial court erred in making the modified child support order retroactive to June 1, 2004, the date on which support payments commenced under the Prior Order. We agree.

"[A] support order may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." (Fam. Code, § 3651, subd. (c)(1).) "An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate . . . ." (Fam. Code, § 3653, subd. (a); see also *In re Marriage of Perez* (1995) 35 Cal.App.4th 77, 80.)

Here, the Order Modifying Child Support was made retroactive to June 1, 2004, the approximate date on which wife filed her original OSC for support. This was error. The modified child support order could only be made retroactive to January 28, 2005, the date wife filed her motion to modify the Prior Order.

8. *The Trial Court Did Not Abuse Its Discretion In Awarding Wife Attorney's Fees*

Husband contends the trial court abused its discretion in awarding wife attorney's fees. He argues that wife, who is now remarried and has very few personal expenses, has enough resources to pay her own fees; while husband, on the other hand, has seen a drastic decrease in his income from over $1,000,000 to under $100,000. We are unpersuaded.

Under Family Code section 2032, the amount of an attorney fee award must be just and reasonable under the relative circumstances of the parties, taking into account each party's need to have sufficient financial resources to present adequately that party's case. We review such an award for abuse of discretion. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1166 (*Drake*).) In *Drake*, the court held: "In view of Family Code section 2032, '[a] disparity in the parties' respective circumstances may itself demonstrate relative "need" even though the applicant spouse admittedly has the funds to pay his or her fees.' (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 14:159, p. 14-35, original italics.) In assessing one party's relative 'need' and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties. (See *id.* at ¶ 14:160.) Furthermore, in determining whether to award attorney fees to one

party, the court may also consider the other party's trial tactics. (See *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 166-168 [] [$750,000 award affirmed under predecessor of section 2032 because the record 'reveals a case of stunning complexity, occasioned, for the most part, by husband's intransigence'].)"

Here, we find no abuse of discretion. Despite husband's protestations, the trial court reasonably could have found him to have a greater ability to pay and that his trial tactics, including his misrepresentations of his financial situation and his failure to produce his financial documents in a timely manner, warranted the order.

9. *Written Statement of Decision*

Husband contends the Order Modifying Child Support should be vacated because the trial court failed to explain its reasoning as required by Code of Civil Procedure section 632 and Family Code section 3654 (§ 3654). We disagree.

Code of Civil Procedure section 632 provides that a request for a written statement of decision must be made before submission if the "trial" is less than one calendar day. Here, assuming the hearing was a "trial," it lasted less than one calendar day at the conclusion of which the trial court took the matter under submission. Because husband did not request a statement of decision before submission, he is not now entitled to one now under Code of Civil Procedure section 632.

Section 3654 provides: "At the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision." In *In re Marriage of Cauley* (2006) 138 Cal.App.4th 1109, the court held: "However, where a party remains silent at the hearing and fails to bring the issue to the trial court's attention, he or she waives the right to a statement." Here, husband did not request a statement of decision at the hearing; accordingly, he has waived the statutory right.

DISPOSITION

The order under review is reversed to the extent it made the modified child support order retroactive to June 1, 2004. The trial court is directed to issue a new and properly calculated child support order retroactive only to January 28, 2005, the date wife filed the OSC for modification. The request for sanctions is denied. In all other respects, the order is affirmed. The parties shall each bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

We concur:

BOLAND, J.

FLIER, J.